United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2347

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FOR THE SECOND CIRCUIT

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P/S

Docket No. 74-2347

ARTHUR S. KURLAN, et al.,

Appellants,

-against-

HOWARD H. CALLAWAY,
SECRETARY OF THE ARMY,
MALCOLM WILSON, GOVERNOR OF
THE STATE OF NEW YORK, AND
JOHN C. BAKER,
COMMANDING GENERAL,
NEW YORK NATIONAL GUARD,

Appellees.

On appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANTS

Of Counsel:

STEVEN J. HYMAN

KUNSTLER KUNSTLER & HYMAN
& GOLDBERG
ATTORNEYS AT LAW
370 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
Attorneys for Appellants

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KUNSTLER KUNSTLER HYMAN
& GOLDBERG
Attorneys for Appellants
370 Lexington Avenue
New York, N.Y. 10017

Of Counsel:

STEVEN J. HYMAN

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the defendants failed to adhere to their own rules and regulations and otherwise abused their discretion in refusing to transfer to the Standby Reserve plaintiffs who qualified under 10 U.S.C.§§269(e)(2) and (g) prior to July 10, 1974?

2. Whether defendant WILSON exceeded his authority and otherwise abused his discretion under §269(g) by seeking to re-define plaintiffs' active duty status under Operation Graphic Hand?

3. Whether the refusal by defendant WILSON to transfer all plaintiffs to the Standby Reserve while granting other Guardsmen similarly situated such rights is contrary to the meaning and intent of Congress and otherwise an abuse of discretion?

STATUTE INVOLVED

10 U.S.C. §269

"§ 269. Ready Reserve: placement; transfer from

(a) Each person required under law to serve in a reserve component shall, upon becoming a member, be placed in the Ready Reserve of his armed force for his prescribed term of service, unless he is eligible to transfer to the Standby Reserve under subsection (e).

(b) The units and members of the Army National Guard of the United States and of the Air National Guard of the United States are in the Ready Reserve of the Army and the Ready Reserve of the Air Force, respectively.

(c) All Reserves assigned to units organized to serve as units and designated as units in the Ready Reserve are in the Ready Reserve.

* * * *

(e) Except in time of war or of national emergency declared by Congress, a Reserve who is not on active duty, or who is on active duty for training, shall, upon his request, be transferred to the Standby Reserve for the rest of his term of service, if

(1) he served on active duty (other than for training) in the armed forces for an aggregate of at least five years; or

(2) he served on active duty (other than for training) in the armed forces for an aggregate of less than five years, but satisfactorily participated, as determined by the Secretary concerned, in an accredited training program in the Ready Reserve for a period which, when added to his period of active duty (other than for training), totals at least five years, or such shorter period as the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, may prescribe for satisfactory participation in an accredited training program designated by the Secretary concerned.

This subsection does not apply to a member of the Ready Reserve while he is serving under an agreement to remain in the Ready Reserve for a st[illegible]od.

(f) Subject to subsection (g), a member in the Ready Reserve may be transferred to the Standby Reserve or, if he is qualified and so requests, to the Retired Reserve, under such regulations as the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, may prescribe.

(g) A member of the Army National Guard of the United States or the Air National Guard of the United States may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned. Aug. 10, 1956, c. 1041, 70A Stat. 12; Sept. 2, 1958, Pub.L. 85-861, § 1(4), 72 Stat. 1437."

Army Regulation 135-91

Paragraph 17 b:

". . . Except for those who are discharged due to expiration of term of military service or other authorized reasons, upon completion of active duty, members will be transferred as follows:

b. Those who have completed a total of five but less than 6 years' Ready Reserve and active Federal service will be transferred to the Standby Reserve." (A. 6 9)

Statement of the Case

This case comes before this Court on an appeal by plaintiffs, who are all members of the New York Army National Guard of the United States, from a decision (A. 6) and judgment (A. 5) by Judge Robert Ward, United States District Court Judge for the Southern District of New York, granting defendants summary judgment and denying plaintiffs' motion for a preliminary injunction. Pursuant to order of this Court on October 17, 1974, this appeal is being prosecuted on an expedited basis (A. 1).

This case was initiated by plaintiffs in July, 1974, by service of a summons and complaint seeking injunctive relief and a declaratory judgment (A. 25). The gravamen of plaintiffs' claim is that as members of the New York Army National Guard of the United States, a part of the Reserve components of the United States, who were called to active duty by the President of the United States in March of 1970, they are, as a matter of law, entitled to transfer from the Ready Reserve to the Standby Reserve upon completion of five years' service, pursuant to Title 10 U.S.C. §269(e)(2). Plaintiffs duly moved for preliminary injunctive relief (A.47,49) and defendants cross-moved for summary judgment (A. 55).

Plaintiffs sought to obtain the relief already granted to other National Guardsmen in the identical case of Mela, et al., v. Callaway, et al., _____ F. Supp. ____, (S.D., N.Y., 1974, Index No. 74 Civ. 2153, opinion, Ward, J. filed June 5, 1974) (A. 13). As will be discussed below, the Court in Mela granted a preliminary injunction which remains in full force and effect today. Further proceedings in the Mela case have been adjourned pending determination of the Kurlan case by this Court.

Simultaneous with the entry of judgment by Judge Ward dismissing the complaint, a stay was entered pursuant to Rule 62(c), Federal Rules of Civil Procedure, enjoining defendants from requiring plaintiffs who would qualify for transfer to the Standby Reserve under §269(e)(2) to report to unit training assemblies pending application to the Court of Appeals (A. 2). The Court of Appeals, upon application by plaintiffs, (see record) extended the stay of Judge Ward in all respects during the pendency of this appeal (A. 1). In addition to this stay, several plaintiffs who would have qualified for transfer to the Standby Reserve but for the actions of defendant WILSON, have been, on consent, relieved from attending two weeks' annual training during the pendency of this action.

Statement of Facts

A. Status of Plaintiffs

Plaintiffs are all members of the New York Army National Guard of the United States who have, as of the date of the complaint, or will have, by February 1975, completed five years of service in the Ready Reserve of the United States Armed Forces. */ Each of the plaintiffs has made application for transfer to the Standby Reserve, pursuant to Title 10 U.S.C. §269(e)(2).

As members of the National Guard of the United States, plaintiffs are deemed to be members of the United States Reserve components and a part of the United States Armed Forces (10 U.S.C. §101(11) and §261). They are in the same status as United States Army Reserve units in terms of fulfilling their military obligation, which requires six years' service in a Reserve component of the Armed Forces (10 U.S.C. §651 and 50 App. U.S.C. §451 et seq.).

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*/ The date on which each plaintiff qualifies for transfer to the Standby Reserve under §269(e)(2) is set forth in the Appendix to the Complaint (A. 36). Additional plaintiffs were added later whose dates of completion of their fifth year range from March 1974 through December 1974. (See Record)

As members of the Reserve components, plaintiffs are required to be either in the Ready Reserve or the Standby Reserve (10 U.S.C. §267). They of course come under the ultimate control of the President and his delegated agents, the Secretary of the Defense and Secretary of the Army (10 U.S.C. §3061).

The determination as to whether plaintiffs are in Ready Reserve or Standby Reserve is determined by Congress under §269(e)(2). The difference between Standby Reserve and Ready Reserve status is critical.

(1) As to Status as Ready Reservists

Under §268, the Ready Reserve is that part of the Reserve components which is subject to call-up by the President without further act of Congress, under 10 U.S.C. §§672 and 673. In addition, a Ready Reservist is liable for call-up for up to two years as an unsatisfactory participant pursuant to §673(a). Further, a Ready Reservist is required to attend two weeks' annual field training and at least 48 drills per year (10 U.S.C. §270, Title 32 U.S.C.§§502,503).

(2) Standby Reserve

Plaintiffs' request for transfer to Standby Reserve would mean that at the end of five years' service they would

be transferred from the Ready Reserve to Standby Reserve status as defined in §273.* As Standby Reservists for their last year of service plaintiffs would not be required to undergo any further annual field training or attend any further drills and would be liable for call-up only by Act of Congress and only when the Ready Reserve was insufficient to meet the manpower needs of the President (§§672,674).

(3) Right to Transfer to Standby Reserve Under 269(e)(2)

Under §269(e)(2), plaintiffs assert their right to transfer to the Standby Reserve. It is, in fact, conceded that plaintiffs qualify in all respects under the terms of that statute. (See Mela v. Callaway, supra.) The sole issue presented to this Court is whether Governor Wilson, purporting to act under §269(g) has, in fact, revoked the prior consent given plaintiffs and has otherwise acted in a lawful manner. It is submitted, as set forth below, that the defendant WILSON has not acted in conformity with the law and that plaintiffs are entitled to transfer to the Standby Reserve.

B. Defendants

Each of the defendants in this action is an essential party to the complaint. Defendant CALLAWAY, as Secretary of the Army, is the person ultimately responsible for

*All statutory cites unless otherwise indicated are to Title 10.

effectuating plaintiffs' transfer from the Ready Reserve to the Standby Reserve under §269(e)(2). Defendants WILSON and BAKER are the persons in command of the New York Army National Guard of the United States under whose command plaintiffs are presently situated. Jurisdiction was not in dispute in the case at bar, having been resolved by the District Court in the prior case of Mela v. Callaway, supra.

C. Chronology of Events

The issues in this case arose from the call-up to active duty of numerous Reserve units and New York National Guard units in March of 1970 by the President of the United States. This call-up was ordered by the President pursuant to the power granted him in 10 U.S.C. §673 to call up the Ready Reserves in a national emergency in order to move the mails during a postal workers' strike.(See Executive Order of the President of the United States 11519, 35 Fed. Reg. 5003.) This call-up was denominated Operation Graphic Hand.

Under the terms of the call-up, units of the Reserves and the National Guard were activated and placed in active federal service. Included in this call-up were units in which plaintiffs named herein were members (A.27 ¶15).

Upon plaintiffs' units being called to active duty, they became members of the United States Army for all purposes

(10 U.S.C. §3499) and were relieved of their status as members of the National Guard (32 U.S.C. §325).

As to Plaintiffs' Service on Active Duty

At the time that plaintiffs' units were called to active duty, each of them was serving at various United States Army posts in a status known as "active duty for training." However, at the moment that their home units were federalized, plaintiffs were deemed to be on active duty for all purposes and their status formally changed from a training status to an active duty status. (See Mela v. Callaway, supra.) Under AR 135-300 the United States Army determined that members who were on active duty for training when their Reserve components were called to active duty in the mail strike were deemed for all purposes to be on active duty. In fact, the United States Army, which under 10 U.S.C. §3499 has sole responsibility for determining the status of members of the Reserve components called to active duty, determined that:

> "Reservists who were on active duty for training at the time of the postal strike and whose units were ordered to active duty by the Department of the Army are to be considered as having served on active duty so as to qualify for transfer under the provisions of 10 U.S.C. §269(e)(2)."
>
> (A. 44)

The Army went on to determine that such a Reservist, for

purposes of considering transfer to the Standby Reserve:

> "... must be considered just as if he had reported to his USAR Center on the morning of 24 March 1970 and remained there until his unit was dismissed. This result is required by the holding in Hornstein coupled with the applicable provisions of AR 135-300..."
>
> (A. 44)

The applicable regulation AR 135-300 is entitled "Mobilization of Army National Guard of the United States and Army Reserve Units" and clearly applies to plaintiffs. Under ¶2-38 of the regulation, Reservists on active duty for training, who are known as REP-63, which includes plaintiffs, are determined to be on active duty when their home units are mobilized and their records are to be changed from active duty for training to active duty status. (See ¶2-38(b)(2) (A. 76). In addition, under ¶3-1, National Guard units called to active duty are considered to be a component of the United States Army and under a mobilization may be employed as the President or his agents may direct (A. 80). In addition, under ¶3-5(f)(2) and (5), the home units of which plaintiffs were members were required to list plaintiffs as a part of the unit when called to active duty (A. 31-33).

It was determined by the Secretary of the Army or his authorized agent that service in Operation Graphic Hand

qualified members of the Reserves components for transfer to the Standby Reserve upon completion of five years' service under §269(e)(2) and ¶175 of AR 135-91 (A. 70). It was, in fact, held by the District Court in reviewing this section that such transfer was mandatory and did not require further discretion or approval on the part of the Secretary of Defense or the Secretary of the Army. (See Hornstein v. Laird, 327 F. Supp. 993 (S.D. N.Y. 1971). The Court is respectfully referred to the factual statement in that case which outlines the procedure followed by the United States Army with regard to transfer to the Standby Reserve. As noted above, the Secretary of the Army, by his authorized agent, further determined that persons in plaintiffs' position, whether Reservists or Guardsmen, qualified under §269(e)(2) and implemented procedures to transfer such individuals to the Standby Reserve. Persons who were members of the United States Army Reserve and who were in the same position as plaintiffs have, in fact, been transferred (A. 29) and it is estimated that over 10,000 Reservists and Guardsmen who were involved in the call-up have qualified under the terms of §269(e)(2). */

*/ There has never been any dispute in either Mela or Kurlan that the Secretary of the Army recognizes that plaintiffs qualify under §269(e)(2) and AR 135-91¶176 for transfer to the Standby Reserve. The sole question has been whether the consent of the Governor under §269(g) was needed and if so, in fact given. (See briefs of United States government in docketed record.)

As to Action by the Governor of New York

On June 10, 1970, the then Governor of the State of New York, Nelson Rockefeller, issued a Proclamation and Executive Order to the effect that members of the National Guard who were on active duty during the mail strike qualified for transfer to the Standby Reserve. In his proclamation, Governor Rockefeller noted that other Reservists were entitled to the year off under §269(e)(2) as a result of their service on active duty during the work stoppage and that therefore National Guardsmen "... who have performed active duty during the work stoppage and who have completed five years of satisfactory service ought to be transferred upon their request to the Standby Reserves" (A. 65). Governor Rockefeller went on to state that the Chief of Staff was to "institute appropriate processes to effect transfer of qualified applicants as soon as possible" (A. 65).

The Executive Order #39 by Governor Rockefeller issued on June 10, 1970, consented to the transfer of National Guardsmen to the Standby Reserve who completed five years of satisfactory service and who:

> "... performed full-time duty in the active military service of the United States pursuant to Proclamation 3972 (35 Fed. Reg.5001) dated March 23, 1970, and Executive Order 11519 (35 Fed. Reg. 5003) dated March 23, 1970, issued by the President of the United States."
>
> (A. 66)

The Governor went on to note that the Chief of Staff was to:

> "... accept applications for such transfers and institute processes to effect transfer of qualified applicants and [sic] soon as possible."
>
> (A. 66)

It is not in dispute that numerous National Guardsmen have been transferred to the Standby Reserve pursuant to the proclamation and executive order solely as a result of the Guardsmens' call to active duty during Operation Graphic Hand, and they continue to be eligible for transfer, today.

On December 18, 1973, the defendant GOVERNOR MALCOLM WILSON, upon taking office, issued Executive Order #1 which provided:

> "... that all Executive Orders and amendments thereto heretofore issued and promulgated and in effect as of this date shall remain in full force and effect until otherwise revoked or modified."
>
> (A. 67)

Notwithstanding the determinations by the United States Army as to plaintiffs' rightful status, and notwithstanding Governor Rockefeller's existing Executive Order as revalidated by defendant WILSON, the National Guard anddefendant CALLAWAY refused to process the requests of plaintiffs and others similarly situated for transfer to the Standby Reserve and ignored requests by plaintiffs' attorney for transfer to the Standby Reserve (A.30, ¶29).

Decision in Mela v. Callaway

In May of 1974, certain persons similarly situated to plaintiffs instituted a lawsuit identical to the one brought by plaintiffs in this action. This case was known as Mela v. Callaway, supra. On June 5, 1974, Judge Robert Ward granted plaintiffs' motion for preliminary injunction and determined that the plaintiffs in that action qualified for transfer to the Standby Reserve under §269(e)(2) and that the consent under §269(g) had been provided by the original Executive Order of Governor Rockefeller dated June 10, 1970 (A.19-21). The Court specifically found that Governor Rockefeller, through his Executive Order, intended to put members of the National Guard "on a parity with members of other Reserve components" (A. 18). Judge Ward further found that the Governor had exercised his discretion when he granted his consent in his Proclamation and Executive Order No. 39 and this order was binding upon defendants. As a result, a preliminary injunction issued for the twenty plaintiffs in Mela and they were relieved of annual field training and attendance at drills, effective June 6, 1974. (A copy of the order is at A. 53 .)

Thereafter, the defendants filed notice of appeal and docketed the case in the Second Circuit. As a result of the appeal filed by defendant in Mela and docketing in the Court

of Appeals their subsequent motion to vacate the preliminary injunction in Mela was denied on September 24th. However, the appeal was not perfected by defendants in a timely manner and on October 10, 1974, defendants' appeal in the Mela case was dismissed by the Court of Appeals. The preliminary injunction granted in Mela, therefore, remains in effect today. Further action by the District Court is awaiting determination of the issues raised in this appeal.

While the Mela case was on appeal, plaintiffs filed their complaint in the case at bar (A. 25). At the time of the filing of this complaint plaintiffs learned of the new action by defendant WILSON.

On July 10, 1974, defendant WILSON issued a new Executive Order No. 8, over one month after the Court's decision in Mela. This new Executive Order continued the prior executive order of Governor Rockefeller and continued to provide for transfer to the Standby Reserve of individuals who served on active duty in Operation Graphic Hand. Its only change from Governor Rockefeller's executive order was to provide that Guardsmen would be transferred only if they "actually performed full-time duty with their assigned units in the active military service" [emphasis added] and added the proviso:

> "... provided, however, that nothing contained herein shall be construed to authorize or permit the transfer to the Standby Reserve of any member of the New York Army National Guard or the New York Air National Guard who did not actually perform such full-time duty with their assigned unit because of their absence from such unit for active duty for training."
>
> [Emphasis added] (A.68)

A comparison of defendant WILSON's Order #8 and Governor Rockefeller's Order #39 indicates that defendant WILSON sought to qualify the term "active duty" by use of the words "actually performed" and "with their assigned units". The same language appears in the proviso at the end of the order. (See A. 66 and compare with A. 68). No other reason or statement was given for this new Executive Order and the sole reasoning behind Executive Order #8 is contained within the four corners of the document.

Based upon this purported amendment to Governor Rockefeller's Executive Order #39 and the prior Executive Order #1 of defendant WILSON, plaintiffs have now been denied transfer to the Standby Reserve. In fact, plaintiffs in both Mela and the case at bar have been denied transfer even where they qualified in all respects for transfer prior to July 10, 1974. Thus individuals who qualified for transfer to the Standby Reserve under §269(e)(2) and §269(g) as early as March 1974 and through the date of this appeal have been denied such status as a result of the Executive Order issued on July 10, 1974.

Based upon the new executive order, defendants moved for summary judgment. Judge Ward found in defendants' favor (A. 6). Judge Ward found that notwithstanding the fact that Governor Wilson was continuing to give his consent to some Guardsmen under §269(g), he could properly refuse to grant his consent to those in plaintiffs' position because of the nature of their active duty service. He further found that defendant WILSON did not abuse his discretion and that he could, in fact, refuse to transfer plaintiffs who qualified prior to July 10, 1974 (A. 9-11). It is from this opinion and decision that plaintiffs take this appeal.

As a result of the conflicting decisions by the District Court in Mela and Kurlan and the delayed action of defendant WILSON, an inequitable incongruity exists with regard to Guardsmen in plaintiffs' position. Since June the Mela plaintiffs have been under protection of court order relieving them from attending summer camp and unit drill assemblies. The Kurlan plaintiffs, however, were denied that relief even though some of them had the same dates of completion of five years of service as plaintiffs in Mela. Instead of an orderly process of transfer to the Standby Reserve, Guardsmen in identical situations are receiving different benefits solely because of the date that they filed their action in federal court. Only by virtue of the stay granted by the Court of Appeals has there been any equity in this situation.

Statement of Law

POINT I

THE DEFENDANTS HAVE FAILED TO ADHERE TO THEIR OWN RULES AND REGULATIONS AND HAVE OTHERWISE ABUSED THEIR DISCRETION IN REFUSING TO TRANSFER TO THE STANDBY RESERVE PLAINTIFFS WHO QUALIFIED UNDER §269(e)(2) AND (g) PRIOR TO JULY 10, 1974.

Under the existing law and regulations prior to July 10, 1974, plaintiffs were entitled to transfer to the Standby Reserve. Executive Order No. 8 of Governor Wilson, effective July 10, 1974, cannot deprive plaintiffs of transfer to the Standby Reserve where they have previously qualified under the terms of §§269(e)(2) and 269(g). While the District Court found that the Governor had the power to revoke his consent at any time and deprive persons of transfer to the Standby Reserve, even if they qualified under pre-existing orders and regulations, it is submitted that such a position is contrary to statute and regulation and otherwise a denial of due process of law.*

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* There is no claim that Executive Order #8 is retroactive in its application. Its very terms provide that it is effective on July 10, 1974. Until that time Governor Rockefeller's Order #39 and defendant Wilson's Executive Order #1 were in full force and effect.

In determining whether the defendant WILSON may refuse to transfer plaintiffs who qualify for transfer to the Standby Reserve prior to July 10, 1974, consideration of certain essential facts is necessary.

A. For the period March through July 10, 1974, numerous plaintiffs, as set forth in the Appendix to the complaint and in the list of added plaintiffs subsequently filed, had completed five years of service in the New York Army National Guard of the United States and had requested transfer to the Standby Reserve. See Complaint, (A. 25) Further, as alleged in the complaint and as conceded by defendants, each of these plaintiffs served on active duty during Operation Graphic Hand.

B. At all times, 10 U.S.C. §269(e)(2) provided that members of the Reserve components who served on active duty, who completed five years' service in the Reserves and who made request for transfer were entitled to transfer as a matter of law. In fact, it has been held in the case of Hornstein v. Laird, supra, that the provisions of §269(e)(2) are mandatory and do not require the exercise of discretion by the Secretary of Defense or the Secretary of the Army.

C. For the period from March through July 10, 1974, the only executive orders in effect dealing with

the subject matter herein were Governor Rockefeller's Executive Order No. 39 (A. 66) and the Executive Order No. 1 of defendant WILSON which specifically revalidated Governor Rockefeller's executive order and stated that Governor Rockefeller's executive order was to remain in full force and effect until modified. Prior to July 10, the District Court in Mela v. Callaway, supra, held as a matter of law that action of Governor Rockefeller under Executive Order No. 39 was the consent required to transfer plaintiffs to the Standby Reserve under the terms of §269(g). While defendants WILSON and BAKER appealed Judge Ward's decision, they permitted such an appeal to lapse and the decision is therefore binding upon defendants.

In view of the above facts, which are beyond dispute, it is irrefutable that each of the plaintiffs who possessed the requisite qualifications for transfer to the Standby Reserve prior to July 10, 1974, were entitled to the benefits of the law as provided by Congress. They had completed, prior to July 10, 1974, every requirement set forth by statute in order to accomplish their transfer from the Ready Reserve to the Standby Reserve. The Governor of New York had given his consent under §269(g) and the terms of §269(e)(2) had been satisfied.

The only reason the specific plaintiffs involved were not transferred prior to July 10, 1974, was that defendants WILSON and CALLAWAY illegally and arbitrarily refused to proceed with the necessary paperwork required by statute. As to these plaintiffs then, the holding of Hornstein v. Laird, supra, is directly on point in all respects. As Judge Bonsal held in that case, the terms of §269(e)(2) are mandatory in that the word "shall" is used in the imperative sense. (See 10 U.S.C. §101(28)). Therefore, where individuals qualify for transfer after completing five years, they are entitled to be transferred to the Standby Reserve. As Judge Bonsal stated: "Therefore, no discretion is vested in the Army." (Supra, at p. 996). In the case at bar no further discretion existed. The only additional requirement not present in Hornstein was the requirements of §269(g). But that requirement was satisfied by the existing Executive Order of Governor Rockefeller. Thus, the theory of Hornstein is on all fours with this case.

The failure of the defendant WILSON to implement his own regulations and defendant CALLAWAY to implement the statutory dictates of Congress in a timely fashion cannot be used as a basis for claiming that plaintiffs who qualified prior to July 10, 1974 can be legally denied their rightful status at a later date. Defendant WILSON in his Executive Order No. 1 clearly revalidated Governor Rockefeller's

Order No. 39. Defendant WILSON specifically stated that Governor Rockefeller's prior executive orders were "to remain in full force and effect until otherwise revoked or modified". (A. 67) Certainly it cannot be claimed by defendants, that defendant WILSON was free to disregard executive orders previously issued under his authority as Commander-in-Chief of the National Guard and which remained in effect until July 10, 1974. (See §3, New York Military Law)

Until July 10, 1974, defendants were bound by their existing rules and regulations and by the statutory terms set forth by Congress. Under Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) this Court has stated that the military is required to adhere to its own rules and regulations. This doctrine has been reiterated time and again in a variety of situations. (See Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970), Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), U.S. ex rel Sledjeski v. Commanding Officer, 478 F.2d 1147 (2d Cir. 1973)). The same theory is no less applicable to defendants WILSON and CALLAWAY in the case at bar. Until July 10, 1974, assuming arguendo that Executive Order No. 8 is valid, defendants were required to adhere to their own rules and regulations and were thus mandated to transfer plaintiffs to the Standby Reserve.

The only reason that defendants can now claim that plaintiffs come within the terms of the July 10th executive order is that defendants WILSON and CALLAWAY refused to process the necessary paperwork to effectuate plaintiffs' transfer prior to that date. Such a theory, of course, renders meaningless the rights provided by Congress under §269. Subsequent action by defendants effective at a later date cannot destroy the rights that existed previously and which rights mandate plaintiffs' transfer.

The District Court's finding that the action by defendants in depriving these plaintiffs of their rights was a valid exercise of discretion, is erroneous. The discretion that may have existed under §269(g) as to these plaintiffs had been exercised previously by Governor Rockefeller and revalidated by defendant WILSON. The refusal to implement the terms of their own executive orders does not cause a rebirth of the discretion as to men who previously qualified. Under Smith v. Resor and Hornstein v. Laird, both supra, plaintiffs who qualified prior to July 10, 1974 were entitled to transfer to the Standby Reserve. The findings by the District Court with regard to this aspect of the case must be reversed.

POINT II

DEFENDANT WILSON HAS EXCEEDED HIS AUTHORITY AND OTHERWISE ABUSED HIS DISCRETION UNDER §269(g) BY SEEKING TO RE-DEFINE PLAINTIFFS' ACTIVE DUTY STATUS DURING OPERATION GRAPHIC HAND

Defendant WILSON has exceeded his authority and abused his discretion under §269(g) by granting certain Guardsmen transfer to the Standby Reserve as a result of their active duty service in Operation Graphic Hand and denying such transfer to plaintiffs. A review of the executive order clearly indicates that the defendant WILSON has determined plaintiffs' active duty service was not sufficient for his purposes. Yet it is submitted that under federal law plaintiffs' active duty service was, as a matter of law, the same for all purposes as that of other Guardsmen and Reservists who were on active duty during Operation Graphic Hand.

Defendant WILSON's Executive Order No. 8 is an illegal intrusion by him into areas exclusively reserved to the federal government and is otherwise an abuse of discretion under state law and 10 U.S.C. §269(g) in that the executive order substitutes the Governor's self-serving interpretation of the concept of "active duty" in place of the interpretation of that concept as definitively stated by Congress and

the Secretary of the Army, who have the sole authority to make such interpretation of federal law.

In considering this issue, it must be emphasized that defendant WILSON continues to give his consent for Guardsmen to be transferred to the Standby Reserve by reason of their service on active duty during Operation Graphic Hand. His executive order specifically provides that men on active duty as a result of the President's call to active duty of the Reserves by proclamation and Executive Order dated March 23, 1970, are still entitled to transfer to the Standby Reserve as originally granted by Governor Rockefeller in 1970. Thus, it is still the policy of the New York Governor to continue to exercise the power given under §269(g) as a result of the mail strike call-up and to thereby give Guardsmen the same benefits accorded Reservists.

The question presented is not whether the Governor may exercise his discretion under §269(g), but whether he may give his consent to some Guardsmen and not to others when under federal law all of the Guardsmen were in exactly the same active duty status under federal law at the time of the call-up, and the sole basis for the Governor's consent is service on active duty in the United States Army as a result of the call-up. The only reason given by the Governor for denying plaintiffs transfer is that they were not "actually" performing active duty with their units during the call-up.

A. Plaintiffs Served on Active Duty for All Purposes

It is beyond dispute that each of the plaintiffs was, in fact, on active duty during the mail strike call-up. Army Regulations enacted by the Secretary of the Army so state,(see AR 135-300, Ch. 2,3 and determination by Army, A. 42-44) Congress has so indicated, (see Title 10 U.S.C. §3499 and Title 32 U.S.C. §325, which provide that once called to active duty a guardsman becomes part of the United States Army) and the courts have so held, (see opinion of Juege Ward, Mela v. Callaway, supra). The only person who persists in refusing to recognize the authoritative interpretation of plaintiffs' correct status during the mail strike is the Governor, and it is submitted that it is neither within his discretion nor prerogative to continue to ignore the plaintiffs' rightful legal classification.

The Supreme Court has stated:

> "In the Armed Forces the term 'active service' has a precise meaning not dependent upon individual conduct. 10 U.S.C. §101."
>
> [Footnote omitted]
> (Bell v. United States, 366 U.S. 393, 410 (1960))

And in Feres v.United States, 340 U.S. 135 (1950) the Court again noted:

> "... without exception, the relationship of military personnel to the Government has been governed exclusively by federal law."
>
> (340 U.S. 135, 146)

Further, a review of the statutory definitions of active duty and active duty for training in the various Congressional statutes, (10 U.S.C. §101(22),(31); 37 U.S.C. §101(18) and 38 U.S.C. §101(21), (22) reveals that Congress intended that there be a distinction between active duty and active duty for training, and that the drawing of this distinction be the exclusive province of the United States Army. Whether an individual is on active duty for training or on active duty is therefore solely for the proper federal military authorities to decide, subject to review by the courts.

If plaintiffs were therefore on active duty, where or how they served was also a question strictly for federal authorities. Under the law as enacted by Congress, plaintiffs' units at the moment of activation became merged with the United States Army. (10 U.S.C. §3499 and 32 U.S.C. §325) See Price v. United States, 100 F. Supp. 310 (Ct. of Claims 1951); Martin v. Mott, 25 U.S. 19; Mancini v. Rhode Island, 271 A.2d 297 (1970) and Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969). As the court in Price stated:

> "The 1916 act was more than a reorganization. It was a temporary absorption of the units that were taken. In order to avoid any possible constitutional question as to their use beyond continental borders, the act did not stop with recognition. It ripped the sack wide open, lifted the strands of the National Guard bodily and wove the component threads into the warp and woof

> of the Regular Army. For the period of such use they were no longer National Guard units, but an integral part of the Army of the United States."
>
> (100 F. Supp. at 317)

The duty assignments of all men on active duty are, of course, subject to the discretion of the President. He can assign them to New York, Kansas or Vietnam, (10 U.S.C. §3501). But, wherever and however they are serving, it is as an active-duty soldier. Thus, in Hornstein v. Laird, supra, the court held that the plaintiffs, who were United States Army Reservists, came within the federal definition of "active duty" when they were called even if all they did was to "cool their heels for four or five hours" and then be dismissed (327 F. Supp. at 996). Therefore the court enjoined Army officials from preventing the plaintiffs' transfer to the Standby Reserve under 10 U.S.C.§269(e)(4) even though the court was constrained to add that, while it believed "that the active duty requirement ... should be pinned to a more realistic foundation, any such revision must be left to the Congress."

B. Defendant WILSON May Not Redefine "Active Duty Status" for His Own Purposes Under §269(g) to Deprive Plaintiffs of Their Rights Accruing Under §269(e)(2).

The action by the defendant WILSON in the present case seeks to bar plaintiffs' transfer because they did not "actually" perform full-time duty with "their assigned units" because of their "absence from the unit for active duty training."

While the Governor's intent is manifest, he has clearly fallen into the trap noted by the court in Hornstein v. Laird, supra, by attempting to draw a distinction between the nature of service of those who were activated. Clearly plaintiffs did perform full-time duty with their units during the call-up. The Army has so stated:

> "5. Reservists who were on active duty for training at the time of the postal strike and whose units were ordered to active duty by the Department of the Army are to be considered as having served on active duty so as to qualify for transfer under the provisions of 10 U.S.C. §269(e)(2) .... Thus the request of [a Reservist] for transfer to the Standby Reserve must be considered just as if he had reported to his USAR center on the morning of 24 March, 1970 and remained there until his unit was dismissed...."
> (¶5 of letter of Col. William Carne, JAGC, (A.44)

Nor were plaintiffs absent from their unit for active duty training. Once the call-up by the President was ordered, plaintiffs were no longer on active duty training; they were on active duty. (See AR 135-300 Ch. 2,3 (A. 71) They were where their commanding officers in New York determined they could best serve. As the Army has determined, plaintiffs are to be considered as having been present for all purposes under §269(e)(2), and to be considered present as if they had reported. (Carne Letter, A. 44)

Thus defendant WILSON's efforts to restate the nature of plaintiffs' service is outside his jurisdiction. While he may have certain discretionary powers, he may not disregard determinations made by the federal authorities

exclusively charged with the making thereof, nor may he use facts not within his domain as the basis of his decision. By so doing, he is exceeding the power that has been delegated him by Congress. (See Harmon v. Brucker, 355 U.S. 579 (1958), where the court, while dealing with discharges, specifically noted that even where there is broad discretion, the official may not base his decision on facts which are outside his jurisdiction.)

Under §269(e)(2), plaintiffs, for federal purposes, qualified for transfer to the Standby Reserve as a result of service on active duty other than for training. Congress intended that once a member of the Reserve forces served on active duty other than for training he is entitled as a matter of law to transfer. There can be no inquiry into what duties a Reservist actually performed beyond the determination that the Reservist was, in fact on active duty. Hornstein v. Laird, supra. No matter how short a time period an individual served or what services he provided, once on active duty he qualified for transfer as a matter of law.

If a Guardsman never served on active duty, he cannot qualify for transfer whether or not the Governor consents. But once a Guardsman has met the qualifications of §269(e)(2), he has, by Congressional direction, met the requirements for transfer as a result of his active duty service, subject only

to the Governor's consent under §269(g). As far as the nature of active duty service is concerned, however, that qualification has been previously decided by competent federal authority.

C. Once Defendant WILSON has Exercised his Authority Under §269(g) he Must do so in Conformity With Federal Law.

Once the Governor has chosen to exercise his prerogatives under §269(g) he must do so in conformity with federal law and not make independent determinations with regard to plaintiffs' federal status. If the Governor determines that Guardsmen as a group are entitled to a year off if they qualify under §269(e)(2) as a result of their active duty service, then the same rationale must be applied to plaintiffs. The Governor may not pick and choose among Guardsmen who are equally qualified solely because he finds their active duty service insufficient. That decision has already been made by Congress and the Secretary of the Army and is now beyond defendant WILSON's prerogative.

In some ways, the action by the Governor is analogous to that which occurred in Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968). In that case, this Court found that while there was no requirement that the Department of Defense recognize conscientious objector status for its personnel, once it did so the military was required to adhere to the procedures set down.

Likewise, in the state use of federal funds in the welfare area, it has been repeatedly held that a state is under no requirement to accept or use the funds, but that once it does so, it is bound by federal requirements. Thus, "although each state may refuse to participate in the federal welfare program, once a state decides to participate it must maintain a system consistent with the Social Security Act." [Cites omitted] Rodriguez v. Vowell, 472 F. 2d 622, 624 (5th Cir. 1973). The same principle has also been enunciated by this Court in the case of Rothstein v. Wyman, 467 F. 2d 226, 232 (2d Cir. 1972):

> "A state is not legally required to participate in Federally assisted aid programs, but if it does it must comply with Federal requirements ...."
>
> (at p. 232)

These analogies give support to plaintiffs' contention that where the Governor exercises his consent he must do so consistently with the intent and meaning of the Congressional act under which this power is derived. He cannot exercise the consent in such a way and under such circumstances that it runs contrary to the intent of Congress. The Governor cannot base his decision to deny consent to some who qualify under federal law by invoking his own theory in direct contradiction to the findings of the appropriate federal authorities on the same issue. The Governor may not disregard the intent of

Congress and seek to impose a greater active duty requirement than the Army sets down. Hornstein v. Laird, supra. Congress did not intend to give the Governor unbridled consent and thereby defeat the very purposes of the Armed Forces Reserve Act.

Congress' main concern was obviously to limit liability for a Reservist who had served on active duty in addition to his regular commitment and to lessen that Reservist's degree of liability. It is therefore clear that §269(e) is directed to this point and would appear to form the gravamen of the Armed Forces Reserve Act as set forth in the legislative history. It was Congress that defined the qualifications for transfer where active duty was served. If the Governor sees fit to exercise his prerogatives under §269(g) it must be done in a manner consistent with the specifications set forth by Congress.

It is doubtful that even under state law the Governor has the power to redefine active duty service, as he now seeks to do. Section 3 of the Military Law of New York, the empowering section referred to by the Governor in Executive Order No. 8, provides:

> "The governor of the state shall be the commander-in-chief of the militia of the state. The governor is hereby authorized to issue regulations for the government of the militia. Regulations issued by the governor shall have the same force and effect as the provisions of this chapter but they shall conform to the laws and regulations of the United States relating to the organization, discipline and training of the militia, to the provisions of this chapter and, as nearly as practicable to the laws and regulations governing the army, navy and air force of the United States." [emphasis added] §3 New York Military Law)

In fact, the commission responsible for the drafting of the New York Military Law takes specific note that state regulations must be consistent with the federal laws and regulations. (See, Notes of Commission to §§1 and 3 of the New York Military Law.) Thus, if even state law provides that the Governor's enactments must conform to federal law, then the Governor is outside the scope of his authority when he seeks to define the law other than as set forth by Congress and the Armed Forces.

In view of the foregoing considerations, the Governor may not give his consent to transfer, generally, to all Guardsmen on active duty and withhold his consent to the transfer of plaintiffs because they were supposedly on an active duty for training or on active duty status not sufficient for his purposes. */ To do so is a clear abuse of his discretion and outside the intent of Congress. Once active duty is determined under federal law, the Governor is bound to adhere to such finding. He may not assess its merit or sufficiency. See Bell v. United States, supra. If he determines that men are to be given one year off as a result of active duty service during the mail strike, then plaintiffs qualify in all respects.

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*/ It should be noted that the consent given by the Governor is not based upon individual considerations of merit. His order is a blanket statement and includes many men who were not "deserving" of the year off. At a hearing and with proper discovery, such evidence could be properly adduced.

The executive order on its face clearly denied plaintiffs' transfer because they did not serve on active duty as the defendant WILSON conceived it. No other basis exists on the face of the document and that is all that can be relied upon. See, Hammond v. Lenfest, supra; United States ex rel Checkman v. Laird, et al., 469 F. 2d 733 (2d Cir. 1972)). Therefore under the rationale set forth in the executive order the defendant WILSON has exceeded his authority and has otherwise abused his discretion under §§269(e)(2) and 269(g).

POINT III

THE REFUSAL BY DEFENDANT TO TRANSFER ALL PLAINTIFFS TO THE STANDBY RESERVE WHILE GRANTING OTHER GUARDSMEN SIMILARLY SITUATED SUCH RIGHTS IS CONTRARY TO THE MEANING AND INTENT OF CONGRESS AND OTHERWISE AN ABUSE OF DISCRETION

The action by the Governor in denying plaintiffs transfer to the Standby Reserve is an abuse of discretion and contrary to the meaning and intent of Congress in providing for the transfer of members of the Reserve components from the Ready Reserve to the Standby Reserve as a result of active duty service. Once the Governor has granted his consent under §269(g) and continues to give Guardsmen the year off as a result of active duty service, defendants may not bar plaintiffs from attaining the same benefits.

A review of the circumstances in this case reveals the arbitrariness of defendants' actions. As a result of the Governor of the State of New York having previously granted his consent to Guardsmen who served on active duty in Operation Graphic Hand, plaintiffs who also qualified under the same conditions will end up receiving different obligations under Federal law. The action by the defendant WILSON in Executive Order No. 8 further confuses the rights of Guardsmen since it may end up that by defendant's effort to circumvent the decision in Mela some plaintiffs will

qualify for transfer to the Standby Reserve while others will not, dependent upon their status on July 10, 1974. It is submitted that a result such as this is contrary to the meaning and intent of the Reserve Forces Act and is otherwise so arbitrary and irrational as to require this Court's intervention.

A. Congress intended a uniform and orderly determination of the Ready Reserve obligation of members of the Reserve components

In setting up the Reserve Armed Forces Act of 1952 Congress sought to bring National Guard units within the Reserve components of the United States and to make them an integral part of it. (U.S.C. Cong. and Adm. News, 1952, pp.2060 et seq.) Congress then sought to set up major categories of the Reserves, the Ready Reserve and the Standby Reserve, and to provide for placement of all members of the Reserve components, including the National Guard of the United States in either of these categories. As the legislative history indicates: "There is no doubt that the concept of the Ready and Standby Reserves is the crux of the entire Armed Forces Reserve Act". (U.S.C. Cong. and Adm. News, 1952, p. 2063).

A review of the legislative history reveals that the House bill provided for the Ready and Standby Reserves while the Senate bill did not, and that in conference the

House bill was adopted. The legislative history further reveals that the House bill intended to provide for transfer from the Ready Reserve to the Standby Reserve of any member of the Reserve components who served on active duty during his Reserve commitment. The House bill therefore provided for transfer to the Standby Reserve under such conditions after five years of service, which provision was accepted by the Senate, resulting in the present §269. (U.S.C. Cong. and Adm. News, 1952, supra). Thus, Congress clearly intended that where a member of the Reserve components had served on active duty for any purpose, he was then eligible for transfer to the Standby Reserve. Hornstein v. Laird, supra.

In addition to the legislative history of §269, the Court is referred to §277, which also reflects the intent of Congress that members of Reserve components be treated equally. Congress intended to establish a uniform liability for all Reserves and to provide for transfer to the Standby Reserve where active duty was served.

It is in this context then that the actions of the defendants must be evaluated. While Congress intended to give the Governor certain prerogatives under §269(g), it did not intend that the Governor be able to discriminate between members of the Reserve components equally entitled to the benefits of §269(e)(2) without proper justification.

Congress could not have intended that where Guardsmen and reservists serve on active duty and where the consent of the Governor is exercised under §269(g) resulting in the transfer of many qualified Guardsmen, that the Governor may nevertheless block the transfer of other Guardsmen equally qualified under Federal law. Yet, this is precisely what happened in this case. As a result of the Governor's action Guardsmen who are equally qualified will end up with entirely different commitments under §269, and the difference between Ready Reserve and Standby Reserve is immense. Some will remain subject to call of the President under §673, while others will not. (See §674) Some will remain subject to call as involuntary Reservists with unsatisfactory participation for up to two years under §673a, while others will not. Some will remain liable for meetings and summer camp for an additional year, while others will not. (§270) It is submitted that such distinctions among equally qualified Guardsmen under Federal law was not intended by Congress.

B. Executive Order No. 8 as presently drafted and implemented is arbitrary, irrational and otherwise an abuse of the Governor's authority under §269(g)

The Governor has chosen to exercise his consent under §269(g) and to continue to exercise that consent under

his most recent Executive Order of July 10, 1974. Once he has chosen to exercise his authority he may not do so in an arbitrary and irrational manner. (Feliciano v. Laird, supra, p. 427). The Governor is not above the law, and while he may have certain prerogatives as Commander-in-Chief of the National Guard, these prerogatives are not unlimited nor exercisable based upon his whim and caprice.

No rational reason is set forth in Executive Order No. 8 for the distinction between plaintiffs and other Guardsmen who qualify under Federal law. The only basis for the distinction, as has been argued previously, is that defendant WILSON seeks to deny plaintiffs their rights under §269(e) because of his own conclusion as to the nature of their active duty service. Executive Order No. 8 makes no reference to military necessity or need in barring plaintiffs from being transferred to the Standby Reserve. Nowhere does the Governor indicate that any emergency exists requiring that he refuse to grant plaintiffs as a group transfer to the Standby Reserve, but that he continue to grant other Guardsmen such a benefit solely because of their active duty service in Operation Graphic Hand.

If the Governor's manpower needs for the operation of the National Guard were the basis for his decision,

then the Governor could have revoked his consent entirely and bar the release of all Guardsmen generally. Or he might have set forth a proper State criteria for determining what Guardsmen would qualify and what Guardsmen would not. This he did not do. Instead he sought to distinguish between qualified Guardsmen by redefining the nature of plaintiffs' active duty service. Such grounds as has been argued previously, are clearly erroneous and outside the scope of his authority.

The situation presented by this case is even more intolerable and irrational if as a result of the Governor's belated and inept action in response to the Mela case some plaintiffs are granted transfer who qualified prior to July 10th, while others are denied it if they qualified after July 10th. Such a result is not within the sound discretion of the Governor's power as given him by Congress under §269(g).

It must be emphasized that this is not a case of "the efficient administration of personnel who have voluntarily become part of the Armed Forces". U.S. ex rel Schonbrun v. Commanding Officer, 403 F.2d 371, 375 (2d Cir. 1968). Nor is it an appropriate balancing of rights against the needs of the service. See Roth v. Laird, 446 F.2d 855 (2d Cir. 1971). Rather it is a situation

in which there is no rationale and in which men's ultimate obligation for service and liability for call in a National emergency is being trifled with. Such a situation cannot be permitted to continue.

If the Governor had reasons that were properly within his jurisdiction for discriminating between plaintiffs and other Guardsmen similarly situated, then he should have so stated them in his Executive Order or otherwise implemented procedure consistent with the discretion given. However, the Governor chose his words and his procedures and he is bound by them. The Executive Order as presently drafted reveals no legitimate State interest in depriving plaintiffs of the rights that accrue under Federal law and only shows the Governor's effort to redefine plaintiffs' proper status. As such the Governor's action was arbitrary and an abuse of discretion and plaintiffs are entitled to receive the same benefits with regard to their Reserve obligation as other Guardsmen who have qualified under Federal law as a result of their active duty service in Operation Graphic Hand.

Conclusion

WHEREFORE, it is respectfully submitted that the decision of the District Court granting appellees' motion for summary judgment should be reversed and appellants' motion for preliminary injunctive relief granted on the grounds:

(1) plaintiffs who qualified prior to July 10, 1974 are, as a matter of law, entitled to transfer to the Standby Reserves pursuant to the terms of §269(e)(2) and §269(g), and

(2) defendant WILSON's Executive Order No. 8 is an abuse of his authority under §269(g) in that he has exceeded his discretion by seeking to redefine plaintiffs' federal status and therefore deprive them of the benefits to which they are entitled under §269(e)(2), and defendant WILSON, under Executive Order No. 8, has otherwise acted arbitrarily, irrationally and contrary to the meaning and intent of §269.

Respectfully submitted,

KUNSTLER KUNSTLER HYMAN & GOLDBERG
Attorneys for Appellants

On the brief:

Steven J. Hyman
Samuel B. Mayer
Jane Deutscher (Law Clerk)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF New York } SS.:

Jane Deutscher

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 85 Livingston St, Brooklyn NY

That on the 31st day of October 1974

deponent served the within Brief and appendix

upon Attorney General, State of New York
U.S. Attorney, Southern District of New York

attorney for Defendants Wilson + Baker, and Callaway, respectively

in this action, at 2 World Trade Center, NYC and Foley Square, NYC

the address designated by said attorney for that purpose by depositing a true copy of the enclosed in a postpaid properly addressed wrapper in a post office — official depository under the exclusive care and custody of the United States Post Office department within New York State.

Jane Deutscher

Sworn to before me,
this 31st day of October 1974

STEVEN J. HYMAN
Notary Public, State of New York
No. 30-7027635
Qualified in Nassau County
Commission Expires March 30, 19